2002 WL 34395941 (N.H.) (Appellate Brief)
Supreme Court of New Hampshire.

THE STATE OF NEW HAMPSHIRE,

v.

Lorraine GABUSI.

No. 2000-675.
December Term, 2002.
December 11, 2002.

Brief for the State of New Hampshire

The State of New Hampshire, Philip T. McLaughlin, Attorney General.

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2. Whether the trial court violated the defendant's constitutional right to confront witnesses by admitting certain hearsay statements under the state of mind exception, when the state of mind exception is a “firmly rooted” exception?

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5. Whether the trial court committed an unsustainable exercise of discretion in ordering the defendant to pay restitution for attorney's fees incurred in a civil proceeding to recover money stolen by the defendant, when the defendant was convicted in this criminal proceeding of theft for stealing that money?

***2** STATEMENT OF THE CASE

The defendant, Lorraine Gabusi, was indicted on one count of theft by deception and two counts of theft by unauthorized taking. The theft by deception charge alleged that she stole more than $200,000 from her dying brother, Raymond Laveron, by causing

him to believe that she would use his money to care for their older sister, Ruth Laveron, who was deaf and blind and had been cared for by Ray for much of her life. The theft by unauthorized taking charges alleged that the defendant used a power of attorney procured from Ruth through fraud and duress to steal approximately $36,000 of Ruth's money.

Following a five-day trial in Coos County Superior Court (Smith, J.), the jury convicted the defendant on all three counts and sentenced her to five to ten years in the New Hampshire State Prison for Women. Additionally, the court suspended one and one-half of the minimum and four years of the maximum sentence and ordered the defendant to pay approximately $64,000 in restitution.

***3 STATEMENT OF THE FACTS**

In 1991, Raymond Laveron moved to Milan, New Hampshire, with his older sister, Ruth Laveron. T1 46. [1] For most of his adult life, Ray took care of Ruth, who was deaf and nearly blind and suffered from diabetes and age-related health problems. T1 47-48. They lived a comfortable yet private life until the spring of 1997. T1 58-59, 70; T2 38.

At that time, Ray took Ruth on a routine visit to her primary care physician, Dr. Jesse Bourbeau. T1 52-54. Dr. Bourbeau, who knew Ray from his years of devoted care for Ruth, noticed that Ray looked ill. T1 52-54.

By June, 1997, Ray had been diagnosed with terminal liver cancer and knew that he did not have long to live. T1 56-57. In the context of treating him, Dr. Bourbeau recommended that Ray make arrangements for Ruth and have a living will prepared. T1 57- 58. Ray, who by that time was confined to his home, asked Dr. Bourbeau if her husband, Attorney Tom Cote, would visit him. T1 60. Ray also said that he would call his younger sister -- the defendant, who was not close with Ruth, to ask if she would come to help him and Ruth. T1 85.

The defendant arrived in New Hampshire from New Jersey on or about July 16, 1997. T4 74. When Dr. Bourbeau met the defendant a few days later, she was shocked by the defendant's lack of interest in Ray's health. T1 62-63, 67-68. She also noticed that the ***4** presence of the defendant created tension in the house, and that Ruth appeared to be intimidated by her. T1 67.

Dr. Bourbeau testified that she expressed to Ray her concern that the defendant did not seem to care as much as he did about Ruth's future. T1 70. She testified that Ray said he wanted the best for Ruth - such as a small residential home where she would be pampered as he had pampered her, rather than a nursing home. T1 70. Dr. Bourbeau testified that when Ray said, “It's not a problem. She can be - I want her to be in good hands,” she understood him to mean that he was not concerned about the expense of providing the best for Ruth because he had sufficient funds to do so. T1 70-71. Dr. Bourbeau also testified that Ray said he trusted the defendant to take care of Ruth because the defendant was “family.” T1 83.

Unfortunately, Dr. Bourbeau proved to be justified in her concern that the defendant did not care about Ruth's future. When she later visited Ruth at Open Arms, the small home that Ruth moved into shortly before Ray's death, she was surprised to find that Ruth had very few of her clothes and none of her furniture. T1 71, 84. Upset, Dr. Bourbeau called the defendant, who responded by writing Dr. Bourbeau to inform her that she was no longer Ruth's doctor and should stop bothering the Laveron family. T1 71-73.

Attorney Cote telephoned Ray on July 3, 1997. T 139. They spoke for over half an hour about Ray's legal needs and concern for Ruth, as Dr. Bourbeau was bound by confidentiality and could not discuss her patient's legal matters with her husband. T1 61, 100, 140. Attorney Cote testified that Ray told him that his main concern was to ensure that ***5** Ruth was taken care of after he died. T1 98, 100. He reviewed with Ray several different options for accomplishing this goal. T1 101. Ray made it clear to Attorney Cote that one proposal -- Ruth being with and being cared for by the defendant - was not a good idea, as the defendant did not get along with Ruth. T1 101.

Attorney Cote testified that when he raised the possibility of Ruth receiving State assistance such as Medicaid, Ray said that he had enough money to provide for Ruth. T1 99, 132-134. Attorney Cote testified that Ray expressed his intention that his money be used to care for Ruth until her death, and that any money remaining after Ruth's death should go to the defendant. T1 98-99.

When Attorney Cote called on Ray at his home, the defendant informed him that Ray was not available. T1 104. When he asked if he could see Ruth, the defendant claimed, to his dismay, she did not know where to find her elderly and infirm sister. T1 105.

When Attorney Cote returned a couple of days later, he was able to meet with Ray, although not out of the defendant's presence. T1 110. He recalled that Ray was extremely weak and that Ray did not speak much. T1 108-09, 112. Attorney Cote testified that the defendant, however, spoke a lot. T1 112.

Specifically, Attorney Cote testified that as he reviewed the ways Ray could implement his intention to provide financially for Ruth's future, the defendant continually suggested that the best solution would be for Ray's assets to be placed under her sole control. T1 113, 116. Attorney Cote testified that the defendant said she would use Ray's assets to take care of Ruth. T1 116. Attorney Cote testified that he attempted to steer Ray away from ***6** handling his estate in that manner, due to the risks associated with having no court supervision over how his intentions were carried out. T1 116.

Attorney Cote told Ray that his existing will, dating to 1988, would accomplish his goal of continuing his life's work of caring and providing for Ruth. T1 114. This will left all Ray's assets in trust for the sole benefit of Ruth during her life, and bequeathed the remainder after Ruth's death to the defendant. T1 119-20.

During the meeting, Attorney Cote charged Ray with choosing between the estate planning options discussed, but Ray, whose body was racked with cancer, said he was tired and that Attorney Cote should telephone him later that afternoon. T1 115. When Attorney Cote telephoned, however, the defendant answered and said that Ray wanted to transfer all of his funds into joint accounts with her. T1 127. Attorney Cote, who required any such direction to come directly from Ray, his client, could not help the defendant effect these transfers. T1 127-29. Curtly, the defendant dismissed Attorney Cote, who would have no further contact with Ray. T1 128-29.

The Department of Health and Human Services, Division of Elderly and Adult Services (“DEAS”), became involved after the defendant called to inquire about services for Ruth, who she described as “large,” “crabby,”“completely difficult,” and without money. T1 158-60. Based upon this telephone call, a referral form was completed for Ruth, and the intake was assigned to a social worker named Jane Gilligan. T1 159, 162.

Based upon the defendant's representations that Ruth had no money and would probably require State assistance, Ms. Gilligan brought various applications related to ***7** Federal and State financial programs on her first visit to Ray and Ruth. T1 162, 176. Ms. Gilligan found Ray to be more gravely ill than she had expected, and Ruth to be neither large nor difficult. T1 174.

Ray and Ruth explained to Ms. Gilligan that they had lived together most of their lives. T1 175. Ms. Gilligan testified that Ray said that he wanted the best for Ruth after he died and that he would provide for her, so there should be no concern about the costs associated with placing Ruth in a private-pay home. T1 177-78. She also testified that Ray told her that he had contacted Attorney Cote and was arranging his affairs so that Ruth would be completely provided for after his death. T1 180.

Nevertheless, Ms. Gilligan completed an application for State financial assistance, as she did not know the extent of Ray's resources and wanted to start the application process for Ruth as a precautionary measure. T1 181-83; T2 16-17. Ruth, whose ability to communicate with Ms. Gilligan, someone she had never met before, was limited by Ray's physical and emotional weakness. T1 174-76, 179; T2 39. Nonetheless, she signed the application, which erroneously listed her as having no assets. T2 37-38. Ruth also signed a subsequent application for Social Security Insurance, which was based upon the erroneous application for State assistance. T2 47-48.

Ms. Gilligan testified that she and Ray discussed the possibility of placing Ruth in "Open Arms," a private-pay residential home in the Lancaster, New Hampshire area. T1 185. She also testified that Ray expressed pleasure in the proposed placement. T2 27-28. ***8** Ms. Gilligan further testified that she made it clear to Ray that no State assistance would be available to pay for Ruth to stay at a private home like Open Arms, and that Ray told her that the expense would not be a problem. T2 27, 29.

During her work with Ruth, Ms. Gilligan also met with the defendant. T2 21. She testified that while touring Open Arms with the defendant, the defendant commented that Ruth did not deserve the high quality of life that Ray had provided for her. T2 25-26; T4 115-16.

Ray died on August 18, 1997. T2 30. Ms. Gilligan, who attended his funeral, was surprised not to see Ruth, and asked the defendant about Ruth's absence. T2 30. The defendant explained that she did not tell Ruth about Ray's death or funeral, as she could not handle having Ruth there. T2 30-31; T4 131-32.

Later, when Ms. Gilligan learned that the defendant had initiated moving Ruth out of Open Arms and into a nursing home that accepted Medicaid, she became concerned. T2 44- 46. In response, she reported her suspicions of **elder abuse** to DEAS and contacted New Hampshire Legal Assistance. T2 44-46; T4 133-35, 150-51. At this time, Ms. Gilligan revised and typed up her handwritten notes and sent them to DEAS along with her file on Ruth. T2 34-35, 59.

On or about July 21, 1997, just two days after she told Attorney Cote that Ray wanted to move all of his money into accounts held jointly with her, the defendant contacted Attorney Tyler Harwell to discuss Ray's legal needs. T2 2 77-78. Attorney Harwell testified ***9** that he met with the defendant the same day, and that she told him that Ray and Ruth wanted to write new wills that left everything to her. T2 78, 80, 83, 85. Without discussing the matter with Ray or Ruth, Attorney Harwell prepared new wills and powers of attorney for both that left everything to the defendant and gave the defendant the right to control their finances. T2 84-85, 91-92; T4 111-12. He testified that the defendant asked him to come to Ray's house when the documents were prepared. T2 88.

During that visit, which occurred just a day or two after his July 21, 1997, meeting with the defendant, Attorney Harwell did not ask Ray or Ruth any questions about their intentions. T2 101-102, 104-05, 114. A few days later, he returned with witnesses and had the wills executed. T2 121. The Coos County Probate Court subsequently determined that the will prepared by Attorney Harwell for Ray was invalid because it was procured with fraud and undue influence. T2 134-134; ANOA 31.

While Ray spent his final days confined by cancer to his bed, the defendant busied herself transferring his money into accounts that she set up in their joint names. On July 21, 1997, just five days after she arrived in New Hampshire, the defendant transferred over $92,000.00 of Ray's money from an account he had for years at the Bank of New York into a U.S. Global Investors mutual fund account. T2 177; T3 6-7; T4 42-43, 74. On July 23, 1997, she transferred almost $50,000 from Ray's Berlin City Savings Bank account to the same U.S. Global Investors account. T2 177-78; T3 8; T4 44, 91-94. The defendant also gave herself and her husband gifts of $10,000 each from Ray's account at Berlin City Savings Bank. T2 166, 169-70.

***10** On July 25, 1997, the defendant transferred another $48,000 of Ray's money from a long-held account at a Pennsylvania bank into the U.S. Global Investors account. T2 178; T4 22-23; T4 45. On August 1, 1997, she gave herself another gift of $10,000 of Ray's money. T2 179. Two months later, after Ray's death and in furtherance of her plan to turn Ruth into a ward of the State, the defendant wrote herself a check for $250,000 on the U.S. Global Investors account. T4 56.

The defendant also helped herself to Ruth's money. Ruth had inherited approximately $47,000 from another sister, Norma Laveron, who died in 1988. T2 159; T4 9, 11, 108-09. On July 30, 1997, the defendant transferred over $24,000 of Ruth's money out of an account at Berlin City Savings Bank, listed in Ray and Ruth's names, and into a new account in the defendant and Ruth's names. T4 74, 76, 82. On August 7, the defendant transferred about $22,000 from Ruth's account to a U.S. Global Investors account in her and Ruth's names. T4 52, 78-80.

At trial, the defendant admitted that she kept over $12,000 of Ruth's money. T5 121- 28, 142-43. Nevertheless, while in possession of this money, the defendant completed a new application for State assistance for Ruth and represented that Ruth had no financial resources on which to survive. T5 102-06, 143.

The defendant testified that she believed that she had done nothing wrong because her dying brother and blind and deaf sister reviewed the documents she had Attorney Harwell prepare for them that left everything to her. T5 43-44, 52. She testified that Jane Gilligan told her to get the powers of attorney for Ray and Ruth. T5 53-54. She testified that she ***11** gave herself Ray's money instead of using it for Ruth because that was what Ray wanted. T5 43. She testified that Ray instructed her to make all the financial transfers. T5 47. She also testified that she transferred Ray and Ruth's money to consolidate their funds and to earn them a higher interest rate. T5 48, 143.

On December 22, 1997, Ruth revoked the power of attorney that she had given to the defendant. T2 149-50. She revoked it because it was presented to her under false pretences and her execution of it was neither knowing nor voluntary. T2 150. She also contested the will that the defendant had Attorney Harwell prepare for Ray, which contest resulted in the invalidation of that will. ANOA 31.

In order to pay her bills, Ruth needed to recover the money stolen by the defendant. She filed suit in Coos County Superior Court, seeking a determination as to the legality of the defendant's actions as her power of attorney. ANOA 31; *Ruth E. Laveron v. Lorraine Gabusi*, No. 98-E-0005. This action was resolved in Ruth's favor by final stipulation pursuant to RSA 506:7. ANOA 31.

On September 22, 1999, the State charged the defendant with one count of theft by deception for stealing from Ray, and two counts of theft by unauthorized taking for depriving Ruth of her money. ANOA 5-9. In a pretrial motion, the State requested a ruling that statements that Ray made to Dr. Bourbeau, Attorney Cote, and Jane Gilligan, about his intention that his assets be used to provide for Ruth, were admissible under the state of mind exception to the hearsay rule. ANOA 10-22. The trial court ruled that Ray's state of mind ***12** was at issue, because the State had to prove that he was deceived by the defendant. ANOA 36. The court also ruled that the statements were trustworthy, because they would be testified to by disinterested witnesses. ANOA 36.

The defendant filed a pre-trial motion seeking to exclude her sworn testimony from the prior probate proceeding. *See* ANOA 36. The court, however, ruled that the prior testimony constituted admissions of a party opponent, and was admissible under Rule 801 (d)(2) because the defendant was a party to the civil proceedings and to this case. ANOA 37.

After the State concluded its case-in-chief, the defendant testified in her defense. While attempting to rebut evidence offered by the State that she knew an account that she stole from belonged to Ruth, the defendant began to testify that Ray had told her the account was his. TT5 71-72. The State objected on the basis that the defendant offered the hearsay statement for its truth. TT5 71-72. The trial court sustained the State's objection.

The jury found the defendant guilty on all three counts. At sentencing, the defendant protested that she should not have to pay restitution to compensate Ruth for the legal fees Ruth paid in forcing her to return the money she stole. ANOA 39; ST 17-18. The court disagreed, and ordered the defendant to pay the fees, which were a direct result of the criminal offenses for which she had just been convicted. ST 25-27.

*13 SUMMARY OF ARGUMENT

The trial court committed no unsustainable exercise of discretion in admitting statements that Ray made to Dr. Bourbeau, Attorney Cote, and social worker Jane Gilligan. Those statements showed Ray's impression that his assets would be used to provide for Ruth, and properly fell within the state of mind exception to the hearsay rule.

The defendant's constitutional right to confront witnesses was not offended by the admission of hearsay under the state of mind exception, Rule 803(3). That exception is a "firmly rooted" exception to the hearsay rule, and firmly rooted exceptions carry sufficient guarantees of trustworthiness to satisfy the Confrontation Clause.

The trial court committed no unsustainable exercise of discretion in sustaining the State's objection to a hearsay statement offered by the defendant. The defendant offered the statement to prove the truth of the matter asserted, and it did not fall within any exception to the hearsay rule.

The trial court committed no unsustainable exercise of discretion in allowing portions of the defendant's sworn testimony from the prior probate proceeding to be admitted in this case. Under Rule 801(d)(2), the prior testimony constituted admissions of a party opponent, and the defendant was a party to the probate court action and to this case.

The sentencing court committed no unsustainable exercise of discretion in ordering the defendant to pay restitution. The award was for legal fees incurred as a direct result of the defendant's criminal offenses.

*14 ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED STATEMENTS MADE BY THE DECEASED VICTIM TO OTHERS UNDER THE STATE OF MIND EXCEPTION TO THE HEARSAY RULE.

The defendant contends that the trial court erred in admitting statements that Ray made to Dr. Bourbeau, Attorney Cote, and social worker Jane Gilligan, expressing his intention that his assets be used to provide for Ruth. DB 24-26; ANOA 35-36. The unsustainable exercise of discretion standard applies to this Court's review of the trial court's decision on the admissibility of evidence. *State v. Gaffney*, 147 N.H. 550, 556 (2002).

Prior to trial, the State filed a motion *in limine* requesting that the trial court rule that these statements were admissible under the state of mind exception to the hearsay rule, New Hampshire Rule of Evidence 803(3). [2] The court granted the motion.

Rule 803(3) provides that hearsay may be admitted if it is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." *N.H. R. Ev.* 803(3); *see Clooney v. Clooney*, 118 N.H. 754, 756 (1978) ("the declaration must concern the mental state of the declarant and have reference to the time at which the declaration was made"). It is noteworthy that the rule recognizes the necessity of admitting hearsay to prevent injustice in will contests and related cases.

***15** The statements in question all concern Ray's then existing state of mind. As he was dying, Ray told those who cared for or assisted him - his doctor, his lawyer, and a social worker - that he wanted his assets to be used to care for Ruth, that he wanted the best for her, that he did not want her to go on State assistance, and that he had sufficient resources to pay for her to stay in a private residential home.

The defendant argues That the statements should not have been admitted under Rule 803(3) because Ray's intent was not at issue in this case and because the statements lacked trustworthiness. DB 9-20. The trial court addressed these two contentions in its pretrial ruling. ANOA36.

First, the court found that Ray's state of mind was at issue, because to prove theft by deception, RSA 637:4,1, the State had to prove that the defendant deceived Ray. ANOA 36. "[D]eception occurs when a person purposely ... [c]reates or reinforces an impression which is false and which that person does not believe to be true, including false impressions [in the mind of a victim] as to law, value, knowledge, opinion, intention, or other state of mind." RSA 637:4, II (bracketed language added). As the trial court soundly concluded, "[I]n order to determine if the defendant created or reinforced a false impression in the decedent as to her intentions, the State must necessarily prove the decedent's impression or state of mind, at that time." ANOA 36.

Second, the trial court found that the statements were trustworthy, because the statements would be testified to by disinterested witnesses. ANOA 36. In its motion in limine the State had explained to the court that Ray made the statements to individuals who ***16** cared for or assisted him -- his doctor and his lawyer and a social worker, that these individuals knew Ray and his relationship with Ruth and how he cared for Ruth, that Ray had spoken out of necessity due to impending death, that Ray had no reason to fabricate, and that Ray's statements were consistent and repetitious. ANOA 11, 17.

This Court should give short shrift to the defendant's contention that the state of mind exception does not apply to Ray's statements because Ray was not a party to the case. The exception contains no requirement that the declarant be a party. A declarant can be any "person who makes statement." *N.H. R. Ev.* 801(b); *Clooney*, 118 N.H. at 756; *cf. Morris Jewelers v. General Elec. Credit Corp.*, 714 F.2d 32, 33-34 (5th Cir. 1983) ("complaints and expressions of anger" in letters from non-party customers admissible to prove their state of mind in case alleging loss of corporate good will).

***17 II. HEARSAY ADMITTED UNDER A "FIRMLY ROOTED" EXCEPTION - SUCH AS THE STATE OF MIND EXCEPTION - DOES NOT OFFEND THE CONFRONTATION CLAUSE.**

The defendant argues that the trial court violated her right to confront witnesses, as guaranteed by the Sixth Amendment of the United States Constitution and/or part I, article 15 of the New Hampshire Constitution, when it admitted the statements that Ray made to Dr. Bourbeau, Attorney Cote, and social worker Jane Gilligan. DB 9-20. The unsustainable exercise of discretion standard applies to this Court's review of the trial court's decision on the admissibility of evidence. *Gaffney*, 147 N.H. at 556.

As discussed in the preceding section of the argument, the court properly admitted the statements under the state of mind exception to the hearsay rule. Hearsay admitted under a "firmly rooted" exception does not offend a defendant's right to confront witnesses as guaranteed by the State and Federal constitutions. *White v. Illinois*, 502 U.S. 346, 357 (1992) ("[W]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied."). Indeed, the defendant has conceded that a "firmly rooted" exception to the hearsay rule satisfies the Confrontation Clause. ANOA 26-28.

In deciding whether a hearsay exception is firmly rooted, the United States Supreme Court has considered whether the exception is embodied in the Federal Rules of Evidence and whether it is widely accepted among the States. *White*, 502 U.S. at 356 n.8; *see Lilly v. Virginia*, 527 U.S. 116, 126 (1999) (describing "a hearsay exception as 'firmly rooted' if, in light of longstanding judicial and legislative experience, it rests on such a solid foundation ***18** that admission of virtually any evidence within it comports with the substance of the constitutional protection." (quotations and citations omitted). The state of mind exception is embodied in Federal Rule of Evidence 803(3) and is widely accepted among the States. The vast majority of courts that have addressed the issue of Confrontation Clause challenges to hearsay admitted under the state of mind exception have recognized that the exception is "firmly rooted." *E.g.*, *Terrovana v. Kincheloe*, 852 F.2d 424, 427 (9th Cir. 1988); *Lenza v. Wyrick*, 665 F.2d 804, 811 (8th Cir. 1981); *United States v. Alfonso*, 66 F. Supp. 2d 261, 267 (D.P.R. 1999); *People v. Waidla.*, 94 Cal. Rptr.2d 396, 419 n.8 (Cal. 2000); *State v. Jones*, 527 S.E.2d 700, 705 (N.C. Ct. App. 2000); *People v. James*, 717 N.E.2d 1052, 1065 (N.Y. 1999); *Forrest v. State*, 721 A.2d 1271, 1277 (Del. 1999); *cf. Clooney*, 118 N.H. at 756 ("state of mind exception to the hearsay rule.... is well established in New Hampshire and elsewhere.").

Although cognizant of this body of legal precedent, the defendant nonetheless argues that Ray's statements to Dr. Bourbeau, Attorney Cote, and Ms. Gilligan -that he intended for his assets be used to care for Ruth and that the defendant should receive what was left only after Ruth died - lacked sufficient guarantees of trustworthiness to satisfy the Confrontation Clause. DB 14-20. This argument is wholly without merit and contrary to well-established law. As the United States Supreme Court held in *White*, "[W]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." *White*, 502 U.S. at 357; *Idaho v.* ***19** *Wright*, 497 U.S. 805, 815 (1990) ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.").

The defendant's suggestion that particularized guarantees must accompany hearsay admitted under a firmly rooted exception is likewise contrary to the law. The reliability requirement of the Confrontation Clause is met by *either* a showing that the hearsay statement "falls within a firmly rooted hearsay exception" or "a showing of particularized guarantees of trustworthiness." *Lilly,* 527 U.S. at 124-25; *Ohio v. Roberts,* 448 U.S. 56, 66 (1980); *White,* 502 U.S. at 363 (Thomas, J. and Scalia, J., concurring); *Wright,* 497 U.S. at 815; *State v. Cook,* 135 N.H. 655, 667-68 (1992) (Thayer, J. and Horton, J., concurring).

In support of her argument, misplaces reliance on part of a statement in Justice Marshall's dissent from the denial of *certiorari* in *Boliek v. Missouri,* 479 U.S. 903 (1986). Justice Marshall's complete statement, "When evidence nominally received under a particular hearsay exception is presented for purposes other than those the exception was designed to serve, the constitutional analysis should not end with the mere semantic invocation of the rule," lends no support to the defendant's argument. For the reasons set forth in the preceding section of the argument, the trial court admitted Ray's statements in accordance with the plain language of Rule 803(3).

***20 III. THE TRIAL COURT PROPERLY EXCLUDED HEARSAY STATEMENTS OFFERED BY THE DEFENDANT**

One issue at trial was whether Ray or Ruth owned an account at Berlin City Savings Bank from which the defendant stole money. TT4 64-65, TT5 95-98. The jury's implicit finding that Ruth owned the account was supported by bank records, will documents, and the defendant's own admissions in a prior civil proceeding. TT4 64-65; TT5 95-98.

The defendant attempted to rebut the State's evidence by testifying that Ray told her the account belonged to him. T5 71-72. The State objected, on the basis that the defendant offered Ray's remarks for the truth of the matter asserted, rather than for a purpose that would render them admissible under any hearsay exception. TT5 71-72.

The trial court sustained the State's objection. The unsustainable exercise of discretion standard applies to this Court's review of the trial court's decision on the admissibility of evidence. *Gaffney,* 147 N.H. at 556.

The defendant challenges to the trial court's ruling on several grounds. First, she suggests that the statement in question should have been admitted to show her state of mind. DB 22. Next, the defendant claims that the court should have admitted the statement merely because it had previously admitted other statements by Ray during the State's case-in-chief. DB 22. She also contends that the statement should have been admitted to counter a misleading advantage given to the State. DB 22. Finally, she attempts to argue -- for the first time -- that the court's ruling violated her constitutional right to a fair trial. DB 22. For the reasons that follow, these challenges are wholly without merit. Further, they are moot because the defendant was later allowed to introduce the hearsay statement in question.

***21** The defendant's contention that the statement should have been admitted under the state of mind exception is without merit. While Ray's statements might have shown his own state of mind and thus been admissible to prove it, they were not admissible to prove the defendant's state of mind because she was not the declarant. *N.H. R. Ev.* 803(3).

The defendant's argument that the trial court should have admitted the hearsay statement simply because the court admitted other statements of Ray when offered by the State is also without merit. Unlike the statements introduced by the State, the statement that the defendant sought to admit did not fall within any exception to the hearsay rule. Therefore, it was inadmissible. The defendant, like the State, must comply with the rules of evidence. *See Chambers v. Mississippi,* 410 U.S. 284, 302 (1973) (requiring compliance "with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence").

The defendant also argues that even if the statements were hearsay, the trial court should have admitted them to prevent the State from gaining a misleading advantage. The defendant cannot raise this issue on appeal because she did not raise it below. *See Quirk v. Town of New Boston,* 140 N.H. 124, 128 (1995).

Even assuming, *arguendo*, that the defendant somehow preserved this basis for argument, it is without merit. The rule concerning misleading advantages applies "only when inadmissible evidence has been allowed, when that evidence was prejudicial, and when the proffered testimony would counter that prejudice." *State v. Benoit*, 126 N.H. 6, 20-21 (1985) (quotation omitted). The rule has no application here, where no inadmissible ***22** evidence came in. Even if Ray's statements to Dr. Bourbeau, Attorney Cote, and Ms. Gilligan, concerning his intention that his assets be used to care for Ruth, were inadmissible and prejudicial, however, it is beyond logic and reason that those statements would be countered by a statement from Ray concerning his ownership of an account at Berlin City Savings Bank.

The defendant also argues that the trial court violated her right to a fair trial by sustaining the State's hearsay objection. The right to a fair trial is a constitutional due process right. The defendant may not make this constitutional argument because she failed to cite constitutional grounds for her objection below. TT5 71-72. *See State v. Cole*, 142 N.H. 519, 521 (1997) (where defendant failed to frame objection in constitutional terms below, defendant is barred from framing issue in constitutional terms on appeal).

Even assuming, arguendo, that the trial court erred in sustaining the State's objection, the error was harmless. State v. Martin, 145 N.H. 313, 314 (2000). The defendant was later allowed to introduce the evidence in question, when she testified that Ray owned the bank account in question, that he had given her the money, and that she lacked the intention to steal. TT5 77,128, 134, 141, 143-44. Further, the strength of the alternative evidence presented by the State was overwhelming; it included bank records, will documents, and the defendant's own admissions in a prior civil proceeding. TT4 64-65; TT5 95-98. Thus, any error was harmless.

***23 IV. THE TRIAL COURT PROPERLY ADMITTED THE DEFENDANT'S STATEMENTS FROM A PRIOR PROCEEDING AS ADMISSIONS BY A PARTY OPPONENT.**

The defendant argues that the trial court should not have denied her motion *in limine* seeking to exclude her testimony in the underlying civil proceeding. DB 30. The unsustainable exercise of discretion standard applies to this Court's review of the trial court's decision on the admissibility pf evidence. *Gaffney*, 147 N.H. at 556.

The defendant failed to raise this issue in her notice of appeal and did not seek leave of this Court to add the question. *See* NOA 2. Therefore, she has waived this issue. *Sup. Ct. R.* 16(3)(b); *Simplex Techs. Inc. v. Town of Newington*, 145 N.H. 727, 732 (2001).

Assuming, *arguendo*, that the issue was somehow preserved, the defendant's argument is without merit. The prior testimony constituted admissions of a party opponent and was admissible under New Hampshire Rule of Evidence 801(d)(2); the defendant was a party to the probate court action and was also a party to this case.

The defendant's contention that admissions of a party opponent are inadmissible unless they give rise to a reasonable inference of guilt is also without merit. DB 30. Rule 801(d)(2) includes no such requirement. Admissions by a party-opponent may be introduced when "[t]he statement is offered against a party and is ... the party's own statement, in either an individual or a representative capacity ...." *N.H. R. Ev.* 801(d)(2). The defendant does not and cannot argue that the statements fall outside the scope of this definition. She misplaces reliance on *State v. Lesnick*, 141 N.H. 121 (1996), which simply acknowledges "the general rule that a defendant's extrajudicial statement giving rise to a reasonable ***24** inference of guilt constitutes an admission" could be introduced under Rule 801(d)(2). *Lesnick*, 141 N.H. at 129 (quotation and brackets omitted). *Lesnick* does not hold that an inference of guilt is a prerequisite for admission under Rule 801(d)(2). *Id.* The defendant also misplaces reliance on *State v. Cassady*, 140 N.H. 46,49 (1995), for the proposition that Rule 801(d)(2) does not apply in a criminal case when the prior proceeding was civil. DB 33. In *Cassady*, this Court simply noted the differences between civil and criminal proceedings as they might apply to the doctrine of collateral estoppel; the case included no holdings concerning the rules of evidence.

***25 V. THE RESTITUTION AWARD WAS APPROPRIATE.**

The defendant argues that the sentencing court[3] abused its discretion by ordering her to pay approximately $64,000.00 in restitution for attorneys' fees that Ruth incurred in bringing a civil action to get her money back. DB 27-29. The unsustainable exercise of discretion standard applies to this Court's review of the trial court's decision on restitution. *State v. Burr,* 147 N.H. 102, 105 (2001) ("Determining the appropriate restitution amount is within the discretion of the trial court.") (quotation omitted); *see Gaffney,* 147 N.H. at 556 (trial court's exercise of discretion reviewed on unsustainable exercise of discretion standard).

Restitution is statutorily authorized for economic losses. RSA 651:62, V. Economic losses include "out-of-pocket losses or other expenses incurred as a direct result of a criminal offense." RSA 651:62, III. Such expenses include "[r]easonable charges incurred for reasonably needed ... services. ..." RSA 651:62, III(a).

After stealing Ruth's money and then refusing to pay Ruth's bills, the defendant went home to New Jersey. TT5 27-29, 140. Ruth needed to recover the money that the defendant stole from her, so that she could pay her bills, and she had to hire attorneys to do so. See ANOA 31. The fees charged by the attorneys were reasonable. In fact, the law firm reduced its usual thirty-three percent contingency fee to twenty-five percent. ST 12-13. The civil court approved the fee, which amounted to over $64,000. ST 12.

***26** Since the fee was awarded out of the proceeds of the civil recovery, Ruth was left with that much less money for her care than she would have had but for the defendant's unconscionable and criminal conduct. Therefore, the inclusion of the attorney's fees in the restitution was entirely consistent with the statute's provision for "expenses incurred as a direct result of a criminal offense." RSA 651:62, V.

The defendant also see to avoid responsibility for her actions on the basis that the restitution was for her civil misconduct. DB 28-29. This claim is absurd, as the civil misconduct that directly caused Ruth to incur reasonable attorney's fees is indistinguishable from the criminal offenses for which the defendant was convicted in this proceeding. *See State v. Eno,* 143 N.H. 465, 470 (1999) (restitution may be awarded for "economic losses directly resulting from the factual allegations that support the conduct covered by the ... conviction.").

The defendant goes on to argue that the sentencing court failed to consider the rehabilitative aspects of restitution. She bases her argument on the trial court's statement that it "question[ed] whether a woman at your age will be helped much by serving a sentence in the state prison for rehabilitative purposes." ST 24. The defendant, however, takes the court's statement entirely out of context. DB 28. The statement plainly applied solely to the incarceration portion of the defendant's sentence.

Contrary to the defendant's position, the sentencing court must state its rationale on the record only when it decides not to order restitution. RSA 6511:63, I. The legislature's ***27** intent is that "the court increase, to the maximum extent feasible, the number of instances in which victims receive restitution." RSA 651:61 -a, II

Given the financial nature of this crime, the defendant's utter lack of remorse, and the extreme indifference toward her victim, the sentencing court properly awarded restitution. ST 23-24. Restitution "can serve to reinforce the offender's sense of responsibility for the offense, to provide [her] with ihe opportunity to pay [her] debt to society and to [her] victim in a constructive manner, and to ease the burden of the victim as a result of the criminal conduct." *Eno,* 143 N.H. at 468 (bracketed language added). Therefore, irrespective of its concern that incarceration might not help the defendant reflect on the criminality of her thefts, the sentencing court implicitly, soundly, and properly concluded that a rehabilitative purpose would be served by the imposition of financial responsibility through restitution.

***28 CONCLUSION**

For the foregoing reasons, the State of New Hampshire respectfully requests that this Honorable Court affirm the decision below. The State desires to be heard orally.

Footnotes

1 References to the record are as follows: “ANOA” refers to the appendix to the notice of appeal; “NOA” refers to the notice of appeal; “TT1” through “TT5” refer to the trial transcript volumes; “ST” refers to the sentencing transcript; and “DB” refers to the defendant's brief. The pertinent page number(s) follow(s) the abbreviation(s).

2 The statements are set forth in an attachment to the -: ? ANOA 20-22.

3 Smith, J., presided over both the trial and the sentencing.

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